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No. (D)

Supreme Court, U.S.
FILED
07-730 NOV 28 2007
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In The

Supreme Court of the United States

KIMBERLY PARKS,

Petitioner,

versus

MISSISSIPPI DEPARTMENT OF TRANSPORTATION AND MISSISSIPPI TRANSPORTATION COMMISSION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. In a Title VII case, alleging sexual harassment, may the employer introduce evidence that the alleged sexual harasser passed a polygraph examination and that the alleged victim refused to take a polygraph examination?

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by Rule 24.1(b) and Rule 29.1 of the Rules of the Supreme Court of the United States.

1. Kimberly Parks, Petitioner;
2. Jim Waide, Counsel for Petitioner;
3. Mississippi Department of Transportation, Respondent;
4. Mississippi Transportation Commission, Respondent;
5. J. Anthony Williams, Esq., Counsel for Respondent;
6. Joseph A. Goff, Esq., Counsel for Respondent; and
7. Lawrence Arthur Schemmel, Esq., Counsel for Respondent.

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The unreported United States Court of Appeals for the Fifth Circuit is attached as Appendix 1. The opinion of the District Court denying motion for a new trial is attached as Appendix 2.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit decided on August 30, 2007, by writ of certiorari under 28 U.S.C. § 1254(1).

RULE OF EVIDENCE INVOLVED

Federal Rule of Evidence 403:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE

On August 10, 2004, Petitioner Kimberly Parks filed a Title VII civil rights suit against her former

employer, the Mississippi Department of Transportation. The complaint alleges that her immediate supervisor made unwelcome sexual advances against her, and that after she filed a grievance protesting the sexual harassment and protesting the failure to give her a promotion, she was fired from her employment. R. Vol. 1, pp. 1-4.

Before trial, Petitioner Kimberly Parks filed a motion *in limine* seeking to exclude evidence that the alleged sexual harasser had passed a polygraph examination and to exclude evidence that she (Petitioner) had refused to take one. Besides arguing that polygraph examinations do not meet the *Daubert*[1] standards of admissibility, Parks also argued that:

> (d) the probative value of such evidence would be outweighed by its prejudicial value and its tendency to confuse the jury on the issues. Fed. R. Evid. 403; *United States v. Scheffer*, 523 U.S. 303, 309-10 (1998).

R. Vol. 6, p. 1285.

The district court denied Parks' motion *in limine* to exclude the polygraph evidence and accepted the Appellees' argument, that "the plaintiff's failure to take a polygraph was part of a legitimate non-discriminatory, non-retaliatory reason to terminate

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[1] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

the plaintiff; therefore, evidence of the polygraph must be admitted . . . " R. Vol. 5, p. 1302.

At the trial, Petitioner testified that her supervisor's (Herron) sexual advances began shortly after she began her employment and she described repeated sexual demands for sex. R. Vol. 5, p. 1302.

Petitioner testified that before giving her an unsatisfactory review in June 2003, her supervisor (Herron) told her that she was "not going to get what she wanted (the promotion) unless he got what he wanted." T.T. Vol. 1, p. 2.

Following the unsatisfactory review, Petitioner filed grievances protesting sexual harassment. T.T. Vol. 1, pp. 25-26.

Following her filing of the grievances protesting the sexual harassment, Petitioner received a call from a management representative demanding that she take a polygraph examination. T.T. Vol. 1, pp. 28-29.

Parks testified that she was not willing to take the polygraph examination because she had done research which indicated the results could be manipulated, and that attorneys had advised her not to take the test. T.T. Vol. 1, p. 30.

On November 21, 2003, Petitioner was fired. T.T. Vol. 1, p. 31. Respondents' notice to Petitioner lists the reason for the termination as follows:

> After an investigation by MDOT's Civil Rights Director, which was inconclusive, you

> were requested to submit to a polygraph, so that MDOT could bring the investigation to a conclusion. You refused to submit to the polygraph examination, even after being informed in writing that refusal could result in disciplinary action, up to and including termination. Mr. Herron, however, agreed to polygraph, which he passed conclusively. Based on the investigation and the polygraph taken by Mr. Herron, MDOT's conclusion is that the allegations made by you against Mr. Herron are false.

R. Vol. 6, pp. 848-49.

The Respondents' witnesses testified at trial that they had asked both Petitioner and her supervisor to take a polygraph examination. They testified that the supervisor (Herron) had passed the examination, but Petitioner had refused to take the test. Parks was, therefore, discharged for making false allegations about sexual harassment. T.T. Vol. 2, pp. 407-09.

The jury returned a verdict for Respondent. R. Vol. 6, p. 1394.

Following the entry of judgment on September 1, 2006, R. Vol. 6, p. 1396, Parks filed a motion for judgment as a matter of law or for a new trial, R. Vol. 6, p. 1397, which the district court denied Parks' motion for judgment as a matter of law or for new trial. R. Vol. 6, pp. 1479-84.

On appeal, the United States Court of Appeals for the Fifth Circuit upheld the District Court's

determination that the Respondents' polygraph evidence was admissible. App. 1, p. 5.

REASONS FOR GRANTING WRIT

The disagreement among the Circuits regarding admissibility of polygraph evidence warrants granting of the Writ.

The Fifth Circuit held that the Petitioner's refusal to take a polygraph examination, and the fact that the alleged harasser had passed a polygraph examination, were admissible to demonstrate that the Respondent "had a reasonable, good faith belief that Petitioner had filed a false claim." App. 1, p. 5.

There is a long-standing split among the Courts of Appeals as to whether, under the Federal Rules of Evidence, polygraph examinations and the refusal of a person to take a polygraph examination, are per se inadmissible or whether, under special circumstances, such evidence may be admitted. This long-term disagreement was described in *United States v. Piccinonna*, 885 F.2d 1529, 1533-34 (11th Cir. 1989), as follows:

> Three roughly identifiable approaches to the problem have emerged. First, the traditional approach holds polygraph evidence inadmissible when offered by either party, either as substantive evidence or as relating to the credibility of a witness . . . Second, a significant number of jurisdictions permit the trial

> court, in its discretion, to receive polygraph evidence if the parties stipulate to the evidence's admissibility before the administration of the test and if certain other conditions are met. Finally, some courts permit the trial judge to admit polygraph evidence even in the absence of a stipulation, but only when special circumstances exist. In these jurisdictions, the issue is within the sound discretion of the trial judge [footnotes omitted].

Piccinonna cites a large number of authorities for each of the three approaches. *Id.* at 1534.

The disagreement among the Courts of Appeals on the admissibility of polygraph evidence has continued. The Sixth Circuit still adheres to the rule that polygraph examinations are inadmissible per se, because their prejudicial effect outweighs their probative value. See, e.g., *United States v. Scarborough*, 43 F.3d 1021, 1026 (6th Cir. 1994) (polygraph evidence is "inherently unreliable"); *Barnier v. Szentmiklosi*, 810 F.2d 594, 597 (6th Cir. 1987) (evidence of polygraph was not properly admissible for any purpose since the "prejudice" outweighs the "dubious probative value"). *Wolfel v. Holbrook*, 823 F.2d 970, 972 (6th Cir. 1987) ("in the absence of an agreement and/or stipulation between the parties to the contrary, results of polygraph examinations are inadmissible into evidence"). Indeed, the Fifth Circuit Court of Appeals once followed this rule of per se inadmissibility. See *Barrel of Fun, Inc. v. State Farm Fire & Cas. Co.*, 739 F.2d 1028, 1031 (5th Cir. 1984) ("Our precedents

'unequivocally hold' that polygraph evidence is inadmissible").

On the other hand, several circuits follow the current Fifth Circuit approach, allowing the district court to use its discretion to determine whether polygraph evidence is admissible under certain circumstances. See *Nawrocki v. Tp. of Coolbaugh*, 34 Fed.Appx. 832 (3rd Cir. 2002) (district court had discretion to find probative value of evidence outweighed its prejudicial effect when admitted on limited issue of probable cause for search); *United States v. Posado*, 57 F.3d 428 (5th Cir. 1995) (polygraph evidence admitted to allow a judge to decide whether consent to search a package was voluntary since there was no jury trial); *United Fire & Cas. Co. v. Historic Preservation Trust*, 265 F.3d 722 (8th Cir. 2001) (trial judge has discretion to determine whether prejudicial effect of lie detector evidence outweighs its probative value).

Decisions such as this one, which permit admissibility of polygraph evidence before a jury, are difficult to reconcile with precedents of this Court. *United States v. Scheffer*, 523 U.S. 303, 312 (1998), stated:

> "Although the degree of reliability of polygraph evidence may depend upon a variety of identifiable factors, there is simply no way to know in a particular case whether a polygraph examiner's conclusion is accurate, because certain doubts and uncertainties plague even the best polygraph exams."

Accordingly, *Scheffer* upheld a court rule providing for a per se exclusion of polygraph evidence. *Scheffer*, 523 U.S. at 314-15.

Additionally, allowing admissibility of the results of a polygraph examination, without requiring any evidence that the polygraph evidence is reliable, seems inconsistent with *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 594-95 (1993), which holds that the federal courts must act as a "gatekeeper" to exclude expert scientific evidence, unless that evidence has been demonstrated to be reliable.

Finally, admitting polygraph evidence in a Title VII retaliation case seems inconsistent with the teaching of *Burlington Northern & Sante Fe Railway Co. v. White*, ___ U.S. ___, 126 S.Ct. 2405, 2415 (2006). *Burlington* taught that the purpose of the anti-retaliation provision of Title VII is to assure that the employer does not interfere with an employee's "unfettered access" to Title VII's remedial provisions. To require an employee to take an unreliable test of truthfulness on penalty of losing his job, denies that employee "unfettered access" to Title VII's remedial provisions.

CONCLUSION

Because of the disagreement among the Circuit Courts of Appeals over admissibility of polygraph evidence, and because the Fifth Circuit's decision

appears inconsistent with this Court's precedents, the Writ should be granted.

Respectfully submitted,

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No. _____

In The
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KIMBERLY PARKS,

Petitioner,

versus

MISSISSIPPI DEPARTMENT OF TRANSPORTATION
AND MISSISSIPPI TRANSPORTATION COMMISSION,

Respondents.

APPENDIX

APPENDIX 1

2007 WL 2491015

United States Court of Appeals, Fifth Circuit.
Kimberly PARKS, Plaintiff-Appellant
v.
MISSISSIPPI DEPARTMENT OF TRANSPORTATION; Mississippi Transportation Commission, Defendants-Appellees.
No. 06-61063.
Summary Calendar.

Aug. 30, 2007.

Jim D. Waide, III, Waide & Associates, Tupelo, MS, for Plaintiff-Appellant.

John Anthony Williams, Deputy City Attorney, Attorney General's Office for the State of Mississippi, Jackson, MS, for Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Mississippi, USDC 1:04-cv-00240-MPM.

Before WIENER, GARZA, and BENAVIDES, Circuit Judges.

PER CURIAM:*

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Plaintiff-Appellant Kimberly Parks appeals the district court's denial of her motion for judgment as a matter of law and new trial on four grounds: (1) The use of polygraph tests by Defendants-Appellees Mississippi Department of Transportation and Mississippi Transportation Commission ("Mississippi" or "the State") violates Title VII's anti-retaliation provision;[1] (2) under Title VII, Mississippi should have "posted" (*i.e.*, made obvious on or in intra-office materials) that polygraph tests would be required following the filing of a discrimination claim; (3) the district court erred in admitting testimony that the alleged sexual harasser had passed a polygraph examination; and (4) alternatively, the district court erred in its instructions to the jury on the use of the polygraph.

First, Parks insists that mandating polygraph examinations for employees who file sexual harassment claims is a per se violation of Title VII's anti-retaliation clause. This argument fails because Parks fundamentally mischaracterizes the facts of this case. Mississippi does not routinely require an employee who asserts such a claim to take a polygraph test,

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[1] The anti-retaliation provision of Title VII of the Civil Rights Act of 1964 provides that: "It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a).

and Mississippi did not fire Parks for her refusal to take such a test in this instance. Parks's refusal was only the "last straw" in the State's sexual harassment investigation. As soon as Parks reported the alleged misconduct, Mississippi promptly transferred her out of the department supervised by her alleged sexual harasser and began what appears to have been a thorough, good faith investigation into her claim. As she and her accused told diametrically opposed stories, the State was faced with a stereotypical "he-says-she-says" swearing match, forcing the employer to do what it could to ferret out the truth. Only when investigators remained uncertain about the validity of Parks's allegations did Mississippi ask both Parks and the alleged harasser to submit to polygraph tests. The alleged harasser took the polygraph and passed, but Parks continually refused. This refusal *and* all previous information accumulated during the course of its investigation led Mississippi to conclude that Parks had lied. Mississippi fired Parks because it concluded that she had submitted a false sexual harassment claim, not because she refused to take a polygraph examination. Parks's refusal to submit to the polygraph was only one of several factors that led to the belief that she had submitted a false accusation; it was this belief that was the proximate cause of her termination.

Even if, *arguendo,* Mississippi had fired Parks solely because of her refusal to take the polygraph, making her refusal to take the polygraph the precipitating cause of her termination, her claim that

mandating polygraph tests for employees who report sexual harassment are unlawful retaliation as a matter of law still would fail. A per se rule against polygraph exams in harassment disputes under Title VII would be overbroad. As this action illustrates, harassment disputes tend to be fact-intensive and case-specific. We agree with the district court that the question whether the use of polygraph tests is retaliatory is best left to a jury in each case. The per se rule that Parks seeks would be incompatible with the fact-sensitive nature of this and other harassment disputes.

Parks's second argument is also without merit. She does not provide any compelling precedent to indicate that Mississippi had a duty to disclose its polygraph examination "requirement." Although Parks's argument assumes that Mississippi had a polygraph examination "requirement," the evidence suggests the opposite, *viz,* that it was not Mississippi's standard operating procedure in sexual harassment investigations to require all involved parties to submit to polygraph exams. Mississippi asked Parks and the alleged sexual harasser to take polygraphs only during the final stages of an investigation that had, to date, yielded inconclusive results. Parks argues that Mississippi's level of disclosure did not meet Title VII's standard, which specifies that an employer "shall post and keep posted in conspicuous places upon its premises . . . information pertinent to

the filing of a complaint."[2] But Mississippi prominently displayed posters in Parks's office area outlining employee rights under Title VII and detailed the State's sexual harassment policy in its employee handbook, which Park possessed. The State's level of disclosure gave Parks notice of her rights and outlined the specifics of how she should file a claim. This disclosure satisfies Title VII's "information pertinent" standard. Although Parks insists that if she had known the State would request a polygraph examination, she would never have filed a sexual harassment claim, we believe that it is highly improbable that *legitimate* victims of sexual harassment would be deterred from filing a harassment claim simply because they might be asked to submit to a polygraph test.

Finally, Parks contends that the district court erred in admitting testimony that the alleged sexual harasser had passed the polygraph test or, alternatively, that the court erred in its jury instructions concerning the appropriate use of the polygraph. Regardless of whether Parks might be barred from raising these arguments because she did not present them in her motion for judgment as a matter of law and new trial, both of these arguments fail on the merits because Parks again mischaracterizes the facts. As discussed above, Mississippi did not terminate Parks simply for refusing to submit to a

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[2] 42 U.S.C. § 2000e-10(a).

polygraph examination, *vel non,* but because her refusal to submit to a polygraph tipped the balance of the investigation against her, leading the State to conclude that her claim was false. Both Parks's objection to testimony that the alleged harasser passed a polygraph examination and Parks's proposed jury instructions concerning the reliability of polygraphs misconstrue the purpose of the polygraph evidence in this case. The reliability of polygraph examinations was not at issue in the trial. Mississippi did not offer the alleged harasser's polygraph examination for its truth or to prove that Parks lied about her claim. It did so to demonstrate that it had a reasonable, good faith belief that Parks had filed a false claim – that the State was justified in using Parks's refusal to submit to a polygraph, together with other evidence, to conclude that she had filed a false claim and therefore should be terminated.

The judgment of the district court is

AFFIRMED.

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI EASTERN DIVISION

KIMBERLY PARKS — **PLAINTIFF**

V. — **CASE NO. 1:04CV240**

MISSISSIPPI DEPARTMENT OF TRANSPORTATION and MISSISSIPPI TRANSPORTATION COMMISSION — **DEFENDANTS**

ORDER

(Filed October 16, 2006)

This cause comes before the court on the plaintiff's motion for judgment as a matter of law and for a new trial. The court has reviewed the briefs and is prepared to rule.

On August 31, 2006, a jury found in favor of the defendants and against the plaintiff in a lawsuit for sexual harassment and retaliation. The plaintiff challenges this verdict on multiple grounds. First, the plaintiff contends that because polygraph tests are unreliable, requiring polygraphs of alleged victims of discrimination is in itself a violation of the anti-retaliation provision of Title VII. Second, the plaintiff contends that the court erred in refusing to receive evidence that the alleged sexual harasser made

himself unavailable at trial, that he did not submit a voice sample, and that he did not give a deposition. Third, the plaintiff contends that the court erred in allowing the defendant to call witnesses who were not listed in their pre-discovery disclosure of core information, and fourth, that the verdict was against the overwhelming weight of the evidence.

ANALYSIS

A motion for judgment as a matter of law in an action tried by a jury is a challenge to the legal sufficiency of the evidence supporting the jury's verdict. *Hiltgen v. Sumrall,* 47 F.3d 695, 699 (5th Cir. 1995). A jury verdict must be upheld unless there is no legally sufficient evidentiary basis for a reasonable jury to find as it did. *Hiltgen,* 47 F.3d at 700. (quoting Fed. R. Civ. P. 50(a)(1)). A jury may draw reasonable inferences from the evidence, and those inferences may constitute sufficient proof to support a verdict. *Id.* On appeal an appellate court is bound to view the evidence and all reasonable inferences in the light most favorable to the jury's determination. *Id.* Even though the court might have reached a different conclusion if it had been the trier of fact, it is not free to reweigh the evidence or to re-evaluate credibility of witnesses. *Id.* The court must not substitute for the jury's reasonable factual inferences other inferences that it may regard as more reasonable. *Id.*

The decision to grant or deny a motion for a new trial is generally within the sound discretion of the

trial court, and is reversible only for an abuse of discretion. *Shows v. Jamison Bedding, Inc.*, 671 F.2d 927, 930 (5th Cir. 1982). A trial court should not grant a new trial on evidentiary grounds unless the verdict is against the great weight of the evidence. *Whitehead v. Food Max of Mississippi, Inc.*, 163 F.3d 265, 269 (5th Cir. 1998) (quoting *Pryor v. Trane Co.*, 138 F.3d 1024, 1026 (5th Cir. 1998)). In passing on a motion for a new trial, a trial court does not need to take the view of the evidence most favorable to the verdict winner, but may weigh the evidence. *Shows*, 671 F.3d at 269 (quoting *Bazile v. Bizzo Marine Co., Inc.*, 600 F.2d 101, 105 (5th Cir. 1979)). This does not mean that a judge may order a new trial simply because he or she disagrees with the jury verdict. *Id.* The judge must be convinced that the verdict is against the great weight of the evidence. *Id.*

1. Polygraph Evidence

The plaintiff asserts that polygraph tests are likely to deter victims of discrimination from complaining; therefore, they violate the anti-retaliation provisions of Title VII. The plaintiff also asserts that the defendants failed to respond to this argument in their brief, so the argument should be taken as confessed. After reviewing the briefs, the court does not agree with the plaintiff's contention that the defendants failed to address the argument and will not deem the argument admitted on this ground.

The defendants did acknowledge the plaintiff's argument in the first paragraph of subsection three in their brief [Doc. 123-*Mem. Brief in Support of Defendants' Response*]. The defendants state, "The Plaintiff argues that this evidence violates Title VII's anti-retaliation provisions. But her argument is directed to the reliability of polygraphs – which is not the issue." The defendants correctly state that the issue at trial was not the reliability of polygraph evidence as no evidence regarding the science of the polygraph was introduced and the jury received a limiting instruction to consider that evidence only as to the defendants' legitimate, non-discriminatory reason in firing the plaintiff and not as to the truthfulness of the plaintiff. However, the vast majority of the plaintiff's argument centered on the reliability or unreliability of polygraph tests. Rather than respond to an argument that was resolved before the trial began, the defendants directed their response to the very small portion of the plaintiff's argument that did address issues raised at trial.

Although the reliability of polygraph examinations was not at issue in the trial, the plaintiff alleges that taking a polygraph deters a victim from reporting discrimination. Mrs. Parks presented the argument to the jury that requiring her to take a polygraph examination during the course of the sexual harassment investigation was retaliatory. The jury did not find that Mrs. Parks suffered retaliation. This court does not find that there is a legal insufficiency of evidence to support the jury's verdict. As the

plaintiff notes, there is a plentitude of literature regarding polygraph tests, and it is not beyond reason for a jury to find that use of polygraphs tests is not retaliatory and that Mrs. Parks was not retaliated against. Essentially, the plaintiff asks this court to make a determination that use of polygraph tests in the investigative stage of Title VII claims is per se retaliatory. While declining to make a determination as to the retaliatory or non-retaliatory nature of polygraph tests, this court defers to the judgment of the jury.

2. Unavailability of Alleged Harasser

The plaintiff argues that the court erred in refusing to receive evidence that the alleged sexual harasser was not available for trial and never gave a voice sample or a deposition. In *Herbert v. Walmart,* 911 F.2d 1044, 1047 (5th Cir. 1990), the Fifth Circuit found that the uncalled witness rule has "no place in cases governed by the Federal Rules of Evidence and the Federal Rules of Civil Procedure." When a witness is susceptible to subpoena by either party, no inference may be drawn by the trier of fact and it is inappropriate for counsel to argue that such an inference is permissible. *Herbert,* 911 F.2d at 1048.

Lander Herron was no longer in the defendants' employ when discovery was occurring in this case, which gives the defendants no greater access to Mr. Herron than Mrs. Parks. Mr. Herron is in fact married to Mrs. Parks' sister-in-law. Mrs. Parks'

argument must fail because Mrs. Parks knew that Mr. Herron had information relevant to the case, had ample opportunity to subpoena him to take a deposition or appear at trial, yet failed to do so. Therefore, this court did not err in refusing evidence regarding Mr. Herron's absence to show an inference of guilt.

3. Witnesses Not Listed in Core Disclosures

The plaintiff also alleges that the court erred in receiving witnesses that were not disclosed by the defendants in their initial core disclosures. The court permitted two witnesses that were not disclosed in the pre-discovery core disclosures made pursuant to Fed. R. Civ. Pro. 26(a)(1)(A). However, the two witnesses were listed in the pre-trial order that was filed on January 23, 2006. Both parties worked on various drafts of the pre-trial order, and at no point did the plaintiff object to the listing of the witnesses.

The plaintiff cites the 7th Circuit case of *David v. Caterpillar, Inc.*, 324 F.3d 851 (7th Cir. 2003) to support her position that the sanction of exclusion of the witnesses should be automatic or mandatory. However, a reading of the case indicates just the opposite. In *David,* the 7th Circuit found that the trial court did not err in permitting testimony of a witness who was not disclosed in the core disclosures. While acknowledging that the 7th Circuit had previously stated that the sanction of exclusion is automatic and mandatory unless the failure to disclose was either justified or harmless, the Court of Appeals

also noted that the determination of whether a Rule 26(a) violation is justified or harmless is entrusted to the broad discretion of the district court. *David,* 324 F.3d at 857. The factors to guide the district court's discretion include: (1) the prejudice or surprise to the party against whom the evidence is offered; (2) the ability of the party to cure the prejudice; (3) the likelihood of disruption to the trial; and (4) the bad faith or willfulness involved in not disclosing the evidence at an earlier date.

In a situation similar to the matter at hand, when ruling on Caterpillar's renewed motion for a judgment as a matter of law, the district court in *David* found that the exclusion of witness testimony was not required because the witness was listed as a potential witness almost a year and one-half before trial; that Caterpillar did not seek a continuance to obtain additional information to rebut the witness; that Caterpillar did introduce evidence to rebut the witness' testimony; and that there was no showing that opposing counsel had acted in bad faith. The 7th Circuit Court of Appeals found that the district court did not abuse its discretion.

In the present case, the two disputed witnesses were listed in the pretrial order for over six months prior to trial, and the plaintiff never objected or inquired about the nature of their testimony. The plaintiff asserts that she was unable to depose the witnesses because discovery deadlines had passed, and that the plaintiff had no "good cause" to reopen discovery pursuant to Rule 16(b). This argument is

unpersuasive because Mrs. Parks' motion to continue the trial was granted on January 27, 2006, with a new trial date being set for August 28, 2006. Mrs. Parks never attempted to reopen discovery and the court finds it difficult to believe that the addition of two previously undisclosed witnesses does not warrant good cause to reopen discovery, particularly for the limited purpose of deposing or otherwise obtaining information regarding the two witnesses. Further, the witnesses' actual testimony regarded the plaintiff's job performance. The plaintiff's purported job performance was relevant to the case and even though the plaintiff's witnesses never addressed the plaintiff's performance in the job at issue, she did put on witnesses whose testimony addressed her honest and hardworking character. Finally, the plaintiff does not allege nor does this court believe that defense counsel intentionally withheld the names of the witnesses to gain a strategic advantage. As such, the inclusion of these witnesses was harmless; therefore, this argument must also fail.

ACCORDINGLY, the court finds that the plaintiff's motion for judgment as a matter of law and new trial is DENIED.

This the 16th day of October, 2006.

/s/ Michael P. Mills
UNITED STATES
DISTRICT JUDGE